No. 06-466

IN THE

Supreme Court of the United States

PACIFIC GAS & ELECTRIC CO.,

Petitioner,

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NUCLEAR ENERGY INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Nuclear Energy Institute (NEI) represents the commercial nuclear energy industry on regulatory matters.[1] NEI's members include every entity licensed by the Nuclear Regulatory Commission to generate electricity at a commercial nuclear power plant or to store used commercial nuclear fuel in the United States. Members also include nuclear plant designers, major architecture and engineering firms, fuel fabrication facilities, and other organizations and individuals involved in the nuclear energy industry. The Ninth Circuit's decision in this case will affect licensing proceedings for every existing and proposed nuclear power plant and fuel storage facility in the United States. NEI and its

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than NEI, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief have been submitted to the Clerk.

members have an interest in ensuring that the National Environmental Policy Act and the Atomic Energy Act are interpreted and implemented together in a correct and sensible manner that protects the public and the environment without pointless delay and expense.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Ninth Circuit has held that the National Environmental Policy Act (NEPA) requires the Nuclear Regulatory Commission (NRC) to consider the environmental consequences of potential terrorist sabotage before licensing the construction and operation of an Independent Spent Fuel Storage Installation (ISFSI) at an existing nuclear power plant. That decision departs from the approach taken by this Court and by other courts of appeals in construing the scope of NEPA. It also defies NEPA's "rule of reason" by imposing substantial burdens on the licensing process without improving either the physical security of licensed facilities or the NRC's consideration of reasonably foreseeable environmental impacts of license approval.

The NRC already defines stringent security requirements for nuclear facilities through other statutory and administrative procedures. It enforces those requirements, and thoroughly considers the reasonably foreseeable environmental impacts of licensing decisions, during the process of licensing any nuclear power plant or ISFSI. The Ninth Circuit's decision will add nothing positive to that process. It will, however, add delay and expense, as is clear from developments in other proceedings even in the short time since the court of appeals' decision. This will burden the efforts of the nuclear power industry and the federal government to fill the widening gap between the demand for power and domestic energy resources. Particularly in light of the critical importance of nuclear power to the Nation's long-term energy security, and the large number of license applications now pending or expected to be filed with the NRC in the near future, the Ninth Circuit's decision warrants review and reversal by this Court.

ARGUMENT

I. THIS COURT HAS RECOGNIZED IMPORTANT LIMITS ON THE SCOPE OF NEPA ANALYSIS

As the petition explains (Pet. 9-14), this Court's decisions in *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766 (1983), and *Department of Transportation* v. *Public Citizen*, 541 U.S. 752 (2004), make clear that NEPA should not be construed to force agencies to consider environmental impacts for which they cannot reasonably be held responsible. Nor should NEPA be construed to require agencies to perform analyses that would not, under the circumstances, meaningfully inform agency decisions about whether or how to take a particular action.

In *Metropolitan Edison*, the Court held that NEPA did not require the NRC to consider the "severe psychological distress" that local residents might suffer if a nuclear plant resumed operations, even though relicensing the plant would be a "but-for" cause of any such distress. 460 U.S. at 774. The Court explained that "[t]ime and resources are simply too limited" for Congress to have intended to extend NEPA to cover every conceivable impact of an agency's decision. *Id.* at 776. Instead, the Court recognized that NEPA's underlying policies and Congress's intent limit the Act's scope in a manner it characterized as similar to "the familiar doctrine of proximate cause from tort law." *Id.* at 774 & n.7. Applying that limitation, the Court found the causal relationship between the federal action at issue, an ensuing change in the physical environment, and the feared distress of residents "too attenuated" to make the NRC potentially "responsible for [the feared] effect" in a way that required NEPA analysis. *Id.* The residents' claim "lengthen[ed] the causal chain beyond the reach of NEPA." *Id.* at 775.

In *Public Citizen*, the Court again recognized commonsense limitations on the scope of NEPA. The President announced that he would lift a ban on cross-border operations by Mexican motor carriers, subject to the promulgation of safety regulations by the Federal Motor Carrier Safety Administration (FMCSA). The FMCSA's NEPA assessment

considered the increased emissions and noise that would result directly from the inspection regime to be established by the regulations, but not environmental consequences that might be caused by the increased cross-border traffic itself. The agency reasoned that those consequences resulted from the President's decision to permit the traffic, not from the agency's safety regulations. 541 U.S. at 761.

This Court agreed. Although the regulations were necessary to permit the cross-border traffic, and would inevitably trigger any environmental effects of that traffic, that was "insufficient to make [the FMCSA] responsible for [those] effect[s] under NEPA." 541 U.S. at 767. Moreover, while NEPA aims to ensure that agencies consider information about potential environmental effects before deciding whether and how to take a particular action, and to facilitate public participation in that consideration, those purposes also serve to limit the statute's reach:

> [I]nherent in NEPA and its implementing regulations is a "rule of reason," which ensures that agencies determine whether and to what extent to prepare an [Environmental Impact Statement (EIS)] based on the usefulness of any new potential information to the decisionmaking process. Where the preparation of an EIS would serve "no purpose" in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS.

Id. at 767-768 (citations omitted).

II. Environmental Effects That Might Be Caused By A Terrorist Attack On A Licensed Facility Are Not Attributable To The NRC For NEPA Purposes

Public Citizen and *Metropolitan Edison* recognize that Congress intended NEPA to require federal agencies to consider only those environmental impacts for which their proposed action would be a reasonably proximate cause. In this case, the Ninth Circuit failed to recognize that, as the NRC reasonably concluded, environmental harm that might

be caused by a terrorist attack on a federally-licensed nuclear facility is not the sort of potential environmental effect that could reasonably be viewed as a proximate result of the NRC's licensing decision. *See* Pet. App. 38a-40a (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 N.R.C. 340, 349 (2002)); *see also City of New York* v. *Department of Transp.*, 715 F.2d 732, 750 (2d Cir. 1983) ("With respect to environmental consequences that are only remote possibilities, an agency must be given some latitude to decide what sorts of risks it will assess.").

Unlike the Ninth Circuit in this case, other courts of appeals have read NEPA to ensure that agencies remain focused on reasonably direct environmental impacts of proposed actions. For example, when the Bureau of Alcohol, Tobacco, and Firearms decided to permit the sale of alcohol in plastic bottles, the D.C. Circuit rejected a claim that NEPA required the Bureau to consider the human health effects that might ensue if a malevolent or deranged third party injected poisons through the plastic. *Glass Packaging Inst.* v. *Regan*, 737 F.2d 1083, 1091 (D.C. Cir. 1984). The court reasoned even if an agency action might result in "reasonably foreseeable" criminal acts, that is not sufficient to require the agency to consider the environmental impacts of those acts under NEPA. *Id.* The court explained that stretching NEPA's scope to such extremes would ultimately *interfere with* agencies' ability to consider the potential environmental impacts that are more realistically related to a proposed action. "The policies served by NEPA are too important to be diluted" by over-reading its requirements. *Id.* (citing *Metropolitan Edison*, 460 U.S. at 775-776). Similarly, in *City of New York* v. *Department of Transportation*, the Second Circuit upheld an agency's determination that the risk of sabotage directed against highway transportation of radioactive materials was "too far afield for consideration." 715 F.2d at 750; *see also Limerick Ecology Action* v. *Nuclear Regulatory Comm'n*, 869 F.2d 719, 743 (3d Cir. 1989)

(NRC did not act arbitrarily and capriciously in deciding not to evaluate the risk of sabotage in an EIS).

The Ninth Circuit has departed sharply from this approach by holding that NEPA requires the NRC to consider the possible environmental effects of a terrorist attack in deciding whether to license a nuclear facility. The existence or operation of a facility is no more than a "but-for" cause of any possible attack upon the facility, and thus of the attack's environmental effects. Such "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA," *Public Citizen*, 541 U.S. at 767. The Ninth Circuit erred in failing to recognize that, for NEPA purposes, the "legally relevant cause," *id.* at 769, of the environmental effects of terrorist sabotage at a nuclear facility would be the acts of the terrorists—not the licensing decision made by the NRC. The resulting conflict among the Ninth, Second, and D.C. Circuits in their approach to this issue warrants resolution by this Court.

III. NEPA Review Of The Environmental Impacts Of Possible Terrorist Attacks Would Enhance Neither The NRC's Comprehensive Regulation Of Facility Security Nor Its Consideration Of Environmental Concerns

In addition to misinterpreting the scope of impacts that NEPA requires agencies to consider, the Ninth Circuit's decision also betrays NEPA's "rule of reason." *Public Citizen*, 541 U.S. at 767. As explained below, Congress and the NRC have addressed the need for security at nuclear power facilities through comprehensive statutory and regulatory schemes. The NRC sets security standards based on a careful and sophisticated threat assessment that assumes the existence of a well-equipped terrorist force. *See* Part III.A. It encourages public notice and comment on those standards, *id.*, and has acted to update them since the attacks of September 11, 2001, *see* Part III.B. Finally, rigorous review during the licensing process ensures both that proposed facilities will comply with the applicable security standards and that a thorough evaluation of reasonably foreseeable environmental impacts has been conducted. *See* Part III.C.

Because the NRC's regulations comprehensively address security at nuclear power facilities and already require consideration of the possible environmental impacts of untoward events that could cause releases of nuclear material or radiation, requiring the NRC and licensees to undertake a separate analysis of the environmental consequences of possible terrorist attacks will not improve either security or the NRC's consideration of environmental impacts proximately caused by the licensing decision. Under the "rule of reason," NEPA does not require the NRC to undertake such a pointless analysis. *See* Part III.D.

A. The NRC Administers A Stringent Regulatory Regime Governing The Steps All Licensees Must Take To Secure Plants Or Spent Fuel Facilities

Under the Atomic Energy Act of 1954 (AEA), Pub. L. No. 83-703, 68 Stat. 936 (codified at 42 U.S.C. §§ 2011 *et seq.*), "no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public." 42 U.S.C. § 2133(d). As a result, in its licensing decisions the NRC is required not only to consider public health and safety, but specifically to ensure the physical security of licensed facilities. For example, the Commission is authorized to:

> [E]stablish by rule, regulation or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable to promote the common defense and security[.]

42 U.S.C. § 2201. Other provisions of the Act require the NRC to:

- Establish minimum criteria for the issuance of licenses for the distribution of "special nuclear material," 42 U.S.C. § 2014, such as fuel or spent fuel, depending on the degree of impor-

tance to the common defense and security or to public health and safety.

- Promulgate regulations or issue orders to "prohibit the unauthorized disclosure of safeguards information," including information concerning plans, procedures and equipment to ensure the security of special nuclear materials. *Id.* § 2167.
- Prohibit disclosure of information concerning the location and safeguards of power plant equipment vital to the safety of special nuclear material and byproduct materials. *Id.*

To comply with the AEA's requirements, the NRC has created a sophisticated and continually evolving regulatory framework to ensure the physical security of nuclear facilities. That framework includes, for example, 10 C.F.R. Part 73, entitled "Physical Protection of Plants and Materials," which is exclusively devoted to nuclear security issues, including those at licensed installations such as nuclear power plants and ISFSIs. *See* Final Rule, Requirements for the Physical Protection of Nuclear Power Reactors, 42 Fed. Reg. 10,838 (Feb. 24, 1977).

Part 73 spans 75 pages in the Code of Federal Regulations. It requires licensed operators of power plants, ISFSIs, and other "fixed sites" to establish and maintain a comprehensive physical protection system to protect against sabotage. The NRC's basic approach is to identify the "design basis threat" and then to require such facilities to be protected against that threat. *See* 10 C.F.R. § 73.1. Although Part 73 does not disclose the non-public assumptions underlying the design basis threat, it does explain the threat's general contours. Nuclear facility licensees governed by Part 73 must assume that they will suffer "determined violent external assault, attack by stealth, or deceptive actions" by several persons who are "well-trained (including military training and skills) and dedicated." *Id.* § 73.1(a)(1)(i)(A). They must expect the attackers will have inside assistance from "a knowledgeable individual" who

will provide information, facilitate entry and exit, disable alarms and internal communications, and offer violent support for the attack. *Id.* § 73.1(a)(1)(i)(B). The attackers are assumed to have: "hand-held automatic weapons, equipped with silencers and having effective long range accuracy"; "incapacitating agents and explosives" for use in gaining entry to or sabotaging the plant or for destroying fuel container integrity; and even, in the case of an attack on a power plant, a "four-wheel drive land vehicle bomb." *Id.* §§ 73.1(a)(1)(iii), 73.1(a)(2)(i)(C)-(E).

To defend against such attacks, Part 73 requires a licensee to "establish and maintain an onsite physical protection system and security organization" to ensure that its operations "are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety." *Id.* § 73.55(a).[2] Section 73.55 goes on to specify the nature of that system in meticulous detail, requiring that it include, among other things:

- A guard force comprised of individuals whose fitness, marksmanship abilities, armament and training are the subject of a dedicated 13-page Appendix to the regulation. *Id.* App. B.
- Multiple layers of "physical barriers" that create illuminated "isolation zones" where people can be observed and evaluated in the event of any plant penetration. *Id.* § 73.55(c).

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[2] Section 73.55 applies to nuclear power plants and, with minor exceptions, to ISFSIs operating under the "general license" provisions of 10 C.F.R. § 72.212. *See* 10 C.F.R. § 72.212(b)(5). ISFSIs that operate under a site-specific license, such as the one specifically at issue in this case, must satisfy security requirements specified in 10 C.F.R. § 73.51. *See id.* § 72.182. Section 73.51 similarly requires licensees to "establish and maintain a physical protection system" that will ensure that their activities do not pose an "unreasonable risk to public health and safety," and contains detailed requirements concerning physical barriers, illuminated isolation zones, alarm systems, and guard forces and their qualifications. The Ninth Circuit's decision would apply to all NRC licensing proceedings.

- Bullet-resistant doors, ceilings, floors, and walls in crucial control areas. *Id.*
- Detection systems capable of ferreting out firearms and explosives, supervised by individuals in a bullet-resistant observation post. *Id.* § 73.55(d).

The NRC does more than just specify required security measures. To assess security at nuclear power plants, it conducts "force-on-force" exercises designed to test the effectiveness of those measures.[3] A force-on-force inspection uses both a table-top drill and a realistically simulated commando-style live attack on the licensee's facility to probe for security deficiencies.[4] In the simulation, a mock adversary force attacks the facility, emulating the behavior of a group trying to damage the reactor's core or spent fuel pool and thereby release radiation to the environment. The attacking force uses simulated weapons and explosives to ensure the most rigorous test possible of the licensee's security measures. These performance-based inspections—unique among federal regulatory programs that cover commercial industries—verify that a power plant's physical features (such as fences, walls and other barriers), security devices (such as alarms and detection equipment), and guard forces can protect its facilities, and ensure that the possibility of an attack does not create an unreasonable risk to public health or safety.

As the NRC has concluded, by virtue of these and other security arrangements:

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[3] The information in this paragraph is drawn from the NRC's website: http://www.nrc.gov/what-we-do/safeguards/faq-force-on-force.html, and http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/force-on-force.html.

[4] A table-top drill is a meeting where representatives from relevant facility operations and security divisions explain and test their institutional reactions to threat scenarios proposed by regulatory personnel.

> [N]uclear power plants are among the most hardened and secure industrial facilities in our nation. The many layers of protection offered by robust plant design features, sophisticated surveillance equipment, physical security protective features, professional security forces, access authorization requirements, and NRC regulatory oversight provide an effective deterrence against potential terrorist activities that could target equipment vital to nuclear safety.

Riverkeeper, Inc. v. *Collins*, 359 F.3d 156, 160 (2d Cir. 2004) (quoting *Entergy Nuclear Operations*, Nos. 50-003, 50-247, & 50-286, at 5 (NRC Nov. 18, 2002)).

B. Since September 11, 2001, The NRC And The Nuclear Industry Have Redoubled Their Efforts To Secure Licensed Facilities From Terrorist Attack

Since September 11, 2001, the NRC has thoroughly reviewed its security regulations in concert with officials from the Department of Homeland Security, the Federal Bureau of Investigation, and the Departments of Transportation and Energy. *See Riverkeeper*, 359 F.3d at 160-161, 168-169; *Private Fuel Storage*, 56 N.R.C. at 343-345, 356-357. It has redefined the "design basis threat" used as the basis for security measures and testing at nuclear power plants. *See* p. 8, *supra*; Revised Design Basis Threat Order, 68 Fed. Reg. 24,517 (May 7, 2003). And it has ordered licensees to implement new and more stringent anti-terror measures at their facilities. *See* Order Modifying Licenses, 67 Fed. Reg. 65,150 (Oct. 23, 2002); Order Modifying Licenses, 67 Fed. Reg. 65,152 (Oct. 23, 2002); Interim Compensatory Measures Order, 67 Fed. Reg. 9792 (Mar. 4, 2002); Access Authorization Order, 68 Fed. Reg. 1643 (Jan. 3, 2003); Security Personnel Training and Qualification Requirements Order, 68 Fed. Reg. 24,514 (May 7, 2003). While the specifics of those changes are not all public, the new measures generally include additional physical barriers, patrols, security posts,

and training.[5] In addition, the NRC has established the Office of Nuclear Security and Incident Response to work with law enforcement agencies and the Department of Homeland Security to ensure immediate operational security and develop long-term security policy. *See Riverkeeper*, 359 F.3d. at 344-345.

For their part, NRC licensees have made extraordinary investments to fulfill their own obligations under the AEA to ensure that nuclear facilities are protected against terrorist attack. *See Riverkeeper*, 359 F.3d at 168-169; *Private Fuel Storage*, 56 N.R.C. at 344. Since September 11, NEI's industry members have spent more than $1 billion to implement the NRC's orders and respond to the revised design basis threat. That money has gone to hire and train more security personnel at power plants and fuel storage facilities, and to add security patrols, security posts, and physical and vehicle barriers. *See* 56 N.R.C. at 344. NEI members have added measures to guard adjacent waterways and additional land areas. *See id.* They have evaluated potential facility vulnerabilities, and developed plans for responding to events that could cause damage to their plants. *See* 359 F.3d at 161. And they have improved their coordination with law enforcement and military authorities and imposed additional restrictions on site access. *See* 56 N.R.C. at 344.

C. The NRC's Licensing Procedures Ensure Compliance With Security Regulations And Mandate Consideration Of Reasonably Foreseeable Environmental Impacts

The NRC applies these regulations to licensees through a rigorous licensing process. When an applicant files a request for a facility-specific license from the NRC, the AEA requires the NRC to hold a formal hearing and to afford any

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[5] The NRC recently initiated a rulemaking to incorporate into its regulations the security requirements prescribed previously by individual orders. *See* Power Reactor Security Requirements, 71 Fed. Reg. 62,664 (proposed Oct. 26, 2006).

person "whose interest may be affected by the proceeding," 42 U.S.C. § 2239(a)(1)(A), the right to be heard. The NRC has promulgated procedural regulations, embodied in 10 C.F.R. Part 2, Subpart L, to govern the conduct of such proceedings for major facilities, including nuclear power plants. *See* 10 C.F.R. §§ 2.1200 *et seq.*[6]

Subpart L proceedings are adjudicatory hearings that comply with the procedural requirements of 5 U.S.C. §§ 554-557. *See Citizens Awareness Network, Inc.* v. *Nuclear Regulatory Comm'n*, 59 F.3d 284 (1st Cir. 1995). Accordingly, they allow for even more public participation than notice-and-comment rulemakings. The NRC makes available a public hearing file containing the licensee's application, the NRC's environmental impact reports, and any other NRC report or correspondence relating to the proposed action. 10 C.F.R. § 2.1203. It then holds public hearings on written submissions from interested parties, and may also hold oral hearings in which the parties may submit questions and, where appropriate, request the right to cross-examine witnesses themselves. *Id.* §§ 2.1204, 2.1207. The outcome of a licensing hearing is subject to review by the full Commission, *id.* §§ 2.341, 2.1212, and the Commission's decision is subject to judicial review, *see* 42 U.S.C. § 2239.

The NRC's regulations also require detailed consideration, during licensing proceedings, of the potential environmental impacts of a licensing decision. Any proceeding that requires a hearing under AEA Section 189(a) also includes NEPA review:

> Any party to a proceeding may take a position and offer evidence on the aspects of the proposed action within the scope of NEPA and this subpart in accordance with the provisions of part 2 of this chap-

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[6] Although the licensing proceedings for the ISFSI at issue in this case occurred under the NRC's subpart K "hybrid" hearing procedures, the Ninth Circuit's holding will apply with equal force to more broadly applicable Subpart L proceedings.

> ter applicable to that proceeding or in accordance with the terms of the notice of hearing.

10 C.F.R. § 51.104(a)(2).

NEPA analyses prepared in connection with NRC licensing proceedings typically consider a wide range of potential accident scenarios. For example, the environmental assessment prepared in connection with the Diablo Canyon ISFSI at issue in this case evaluates the impact of relatively minor accidents such as the loss of external electric power or dropping a fuel storage cask from an elevated position. *Environmental Assessment Related to the Construction and Operation of the Diablo Canyon ISFSI* 19 (Oct. 2003). It also considers the potential impact of more severe events such as "design basis" earthquakes and tornados, and concludes that any radiation release resulting from such foreseeable events would fall within permissible limits. *Id.*; *see also* 10 C.F.R. §§ 20.1001 *et seq.*

D. Considering Possible Environmental Impacts Of An Attack During Licensing Proceedings Would Not Improve Plant Security Or The NRC's NEPA Analysis

In light of the NRC's comprehensive security regulations and rigorous licensing procedures, requiring the agency and its licensees to examine the environmental impacts of a possible terrorist attack would violate NEPA's rule of reason by requiring costly and time-consuming analyses that would not improve security, improve consideration of environmental impacts, or affect licensing decisions.

As detailed in Part III.A, the NRC has developed its security regulations based on sophisticated threat assessments and applies the regulations uniformly to all fixed facilities. The NRC deems any facility that meets the security requirements to be adequately protected from attack. Accordingly, requiring a NEPA analysis of the environmental consequences of a terrorist attack on a given facility during licensing proceedings would not alter the agency's conclusions regarding the adequacy of that facility's security

measures. This becomes even more apparent once one considers the proper scope of NRC licensing proceedings. As explained above, those proceedings give interested parties access to public information about a given licensee's compliance with the NRC's security requirements, and provide them a forum in which to test or challenge that compliance. They do not, however, provide an avenue for parties to debate or propose modifications to the security requirements themselves, which apply uniformly to all fixed facilities. *See* 10 C.F.R. § 2.335 (parties may not challenge NRC rules in licensing proceedings). As a result, the NRC could not use the results of an analysis of environmental impacts of a terrorist attack at a licensee facility to demand site-specific modifications of security requirements for that facility.

Similarly, with respect to concerns about environmental impacts, the NRC's license adjudication process already considers the possible environmental impacts of events at nuclear facilities. Licensees must analyze and mitigate the risk of those impacts, including any that might result from a release of nuclear material or radiation. Adding terrorist attack to the list of possible causes of such a release would not enhance NRC's understanding of the potential environmental impact of granting a given operating license. Nor would it lead to different mitigation efforts, because by complying with the NRC's extensive security requirements the licensee has already taken all the steps the Commission has determined are reasonably required to address the risk of a terrorist attack.

In short, requiring licensees and the NRC to undertake specific NEPA evaluation of the possible environmental effects of a terrorist attack will neither improve analysis nor change results.[7] NEPA does not require the NRC to under-

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[7] Indeed, requiring an environmental analysis of terrorism threats might well *degrade* the NEPA process, much as once happened with former NEPA regulations that required agencies to address "worst case" environmental scenarios whenever the real risk of harm was impossible to ascertain. The Council on Environmental Quality abandoned that ap-

take such pointless efforts. *See Public Citizen*, 541 U.S. at 767-769; *cf. Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 325 (1975) (declining to require agency to evaluate issue under NEPA when it "was already doing so in a more appropriate proceeding"); *Glass Packaging Inst.*, 737 F.2d at 1092 (NEPA did not require Bureau of Alcohol, Tobacco, and Firearms to analyze food-security concerns more properly addressed by Food and Drug Administration).

IV. THE COURT SHOULD GRANT CERTIORARI AND REVERSE BECAUSE THE NINTH CIRCUIT'S DECISION WILL IMPEDE NUCLEAR LICENSING AT A CRITICAL TIME

While the Ninth Circuit's decision will not enhance the NRC's decisionmaking or the public's ability to participate in those proceedings, it will increase the time and expense involved in licensing a wide array of nuclear facilities.[8] That prospect is not hypothetical. In the short time since the court of appeals issued its opinion, the court's analysis has already been applied in other cases and agency decisions, and invoked in a number of additional proceedings where private parties have requested consideration of terrorism risks under NEPA. For example:

- In evaluating a proposed lease of land for an ISFSI at an Indian reservation, the Bureau of Indian Affairs recently claimed that "uncertainty surrounding [NEPA analysis of sabotage] highlighted by the *San Luis Obispo* deci-

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proach when it recognized that requiring "worst case" analysis led agencies to devote "substantial time and resources" to environmental analyses that did not aid decisionmaking but instead "divert[ed] the EIS process from its intended purpose." National Environmental Policy Act Regulations, 50 Fed. Reg. 32,234, 32,236 (proposed Aug. 9, 1985); *see also* Daniel R. Mandelker, *NEPA Law and Litigation* § 10:22, at 10-52 (2006).

[8] The NRC issues licenses not only for power plants and used fuel storage facilities but also for other nuclear facilities, including those for radioactive waste disposal, e.g., 10 C.F.R. § 61.1 *et seq.*, irradiators used in food preservation and to sterilize medical supplies and equipment, *id.* § 36.13, and university research reactors, *id.* § 50.21. The decision below will make all these proceedings more burdensome.

sion counsels disapproval." *Record of Decision for the Construction and Operation of an ISFSI on the Reservation of the Skull Valley Band of Goshute Indians in Tooele County, Utah* 21 (B.I.A. Sept. 7, 2006).

- Parties have raised as-yet-unadjudicated contentions regarding the environmental impacts of terrorist sabotage during licensing hearings for the Pilgrim Nuclear Power Station in Massachusetts and the Palisades Nuclear Plant in Michigan.
- Opponents have challenged licensing proceedings at the Vermont Yankee Nuclear Power Station, *see Entergy Nuclear Vermont Yankee & Energy Nuclear Operations, Inc.*, LBP-06-20, at 17-30 (NRC Sept. 22, 2006).
- The Nuclear Information and Resource Service, Public Citizen, and Sierra Club have relied on the decision below to attack an EIS prepared for an Early Site Permit for the Grand Gulf Nuclear Station in Mississippi. *See* Request for Admission of Late-Filed Environmental Contention, *In re System Energy Resources Inc.*, No. 52-009-ESP (NRC Oct. 12, 2006).
- In *Tri Valley Cares* v. *Department of Energy*, No. 04-17232, 2006 WL 2971651 (9th Cir. Oct. 16, 2006), the Ninth Circuit rejected an agency's NEPA review of a planned biological weapons laboratory, even though it agreed that the agency had taken a "hard look" at environmental concerns and that its analysis was "fully informed and well-considered." *Id.* at *1 (internal quotations omitted). The court relied solely on the decision below in this case to hold that the agency had to examine whether "the

threat of terrorist activity" necessitated further study. *Id.* at *2.

- On December 11, a coalition of groups opposing Southern Nuclear Operating Company's early site permit application for new reactors at the Plant Vogtle site in Waynesboro, Georgia, filed a petition explicitly requesting the NRC to apply the Ninth Circuit's decision in this case.[9]

Nuclear power facilities are massively expensive and time-consuming to license and to construct. By erecting a new procedural hurdle in the licensing process, the Ninth Circuit's decision threatens to discourage the substantial capital investment necessary to bring such facilities on-line to meet the Nation's energy needs. This is all the more true because NEPA procedural requirements create fertile ground for litigation, which, in turn, would yield even further delay and expense.

Such obstacles place pointless burdens on the nuclear licensing process at a time when there is a significant need for nuclear power facilities. Without a substantial boost in domestic supplies, U.S. energy consumption will increasingly outpace production.[10] Over the next 10 years, the utility industry expects demand to increase by almost 20%, while "committed capacity resources" are expected to increase only 6%.[11] The challenge to increase production is compounded by the problems associated with fossil-fuel energy sources. Reliance on imported oil threatens our national se-

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[9] *See* http://www.cleanenergy.org/pdf/VogtlePetition121106.pdf.

[10] *See* National Energy Policy Development Group, *Reliable, Affordable, and Environmentally Sound Energy for America's Future: Report of the National Energy Policy Development Group* viii-ix (May 2001) ("National Energy Policy").

[11] North American Electric Reliability Council, *2006 Long-Term Reliability Assessment: The Reliability of the Bulk Power Systems in North America* 6 (Oct. 2006). "Committed capacity resources" is defined as generating capacity that is "existing, under construction, or planned" and expected to be available. *Id.* at 11.

curity, and tapping domestic fossil-fuel reserves will increase the release of air pollutants such as nitrogen oxides, sulfur dioxide, and mercury, as well as greenhouse gases.[12] Nuclear energy can reduce dependence on foreign oil, without emission of the greenhouse gases and other pollutants associated with fossil fuels.[13] Thus, nuclear power is a crucial component of any long-term strategy to meet the Nation's energy needs in ways that are reliable, affordable, and environmentally sound.

Currently, there are 103 nuclear power plants operating in the United States, providing 20% of the Nation's electricity demands.[14] As these plants continue to operate, they generate used fuel that must be stored in specially-designed facilities like the Diablo Canyon ISFSI. The NRC has already issued licenses for 34 spent fuel storage facilities, including the one at Diablo Canyon. But meeting the Nation's current and future need for nuclear power will require the NRC to license more. NEI expects seven additional fuel storage sites to be added in 2007 alone.

The NRC expects increased licensing activity for nuclear power plants as well. Power plant licenses are normally valid for an initial period not to exceed 40 years, *see* 10 C.F.R. § 50.51(a), and can be renewed for an additional 20 years of operating life, 10 C.F.R. § 54.31(b). Thus far, the NRC has renewed 47 licenses for nuclear power plants, and has pending before it renewal applications for 11 additional plants. NEI members have announced that they will seek at least 24 more renewal licenses for existing plants, and more are expected.[15] Even more importantly, NEI members expect to seek licenses from the NRC for a significant number

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[12] National Energy Policy xiii, 1-6.

[13] *Id.* at xiii, 1-5 to 1-6.

[14] *Id.* at 5-15.

[15] Information concerning power plant license renewals is available on the NRC website at http://www.nrc.gov/reactors/operating/licensing/renewal.html.

of *additional* nuclear power plants in the coming years. Thirteen consortia and companies involving NEI members are preparing 20 applications for as many as 31 new plants. NEI members are also prosecuting four early site permit applications, which are used to "bank" sites for future nuclear power plants.

As even this brief discussion makes clear, the court of appeals' decision will have a broad negative impact at a critical time. Yet, the expense and delay caused by the court's serious misapprehension of NEPA's proper sphere of application will do nothing to enhance agency decision-making, improve public participation in the nuclear licensing process, or protect the environment. The Ninth Circuit's decision warrants review and reversal by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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